

- (1) What, if any, is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was employed by respondent as a sheet metal assembler from November 6, 1992 until January 5, 1993. This was claimant's second period of employment with respondent, having worked for respondent for approximately three years until June 1992, at which time he was laid off. Claimant suffered a prior work-related injury to his right arm in May 1990 when he was diagnosed with and treated for carpal tunnel syndrome. Surgery for claimant's original carpal tunnel syndrome was successful and claimant returned to work, with an 11.5 percent functional impairment as a result of that injury. Claimant had also suffered prior injuries to his cervical spine which resulted in a restriction of no lifting over 25 pounds. On November 6, 1992, prior to claimant's return to work for respondent, he was reexamined by Dr. Robert Clark who had treated him for the original carpal tunnel syndrome. Claimant's restrictions to his right upper extremity were removed, but the restrictions to claimant's cervical spine remained. When claimant returned to work the evidence, while somewhat unclear, indicates he worked within his weight limitations although his work with respondent did require repetitive activities to both upper extremities.

Shortly after returning to work claimant began experiencing recurrent symptomatology to his right upper extremity, extending into the shoulder. At some later time he also began experiencing symptomatology to his left upper extremity. Claimant returned to Dr. Clark on January 7, 1993, after his initial request for treatment from the respondent was refused. Respondent did eventually refer claimant to Dr. Harry Morris, who restricted claimant from using vibratory tools and referred claimant for an injection to his right shoulder which relieved claimant's right shoulder pain. Dr. Morris also referred claimant for physical therapy and work hardening. Dr. Morris estimated claimant's impairment to be 12 percent to the body as a whole.

Claimant was examined by Dr. Daniel Zimmerman at the request of his attorney. Dr. Zimmerman imposed specific restrictions and limitations upon claimant for the injury to claimant's right shoulder. Dr. Zimmerman rated claimant at 22 percent to the body as a whole.

Claimant received vocational training at the expense of the respondent from August 1993 through July 1994 in aircraft industrial maintenance, but has not been able to find a position in that field. At the time of the regular hearing claimant was working for \$5.50 an hour at Mid-Continent Airport in Wichita. Claimant continued to experience ongoing symptomatology in his upper extremities, right elbow and right shoulder.

The medical evidence from Dr. Morris indicates that claimant's right shoulder symptomatology ceased subsequent to the injection in his shoulder. Dr. Morris' records also indicated claimant's complaints to his left upper extremity ceased after three to four months of treatment, with the last several months of treatment involving only the right upper extremity.

When claimant was examined by Dr. Zimmerman, claimant had complaints of pain in both upper extremities and his right shoulder. Dr. Zimmerman testified on April 3, 1995 and again on April 13, 1995. At the second deposition, Dr. Zimmerman

revised his functional impairment ratings, finding 4 percent to the right shoulder, 5 percent to the right elbow, 6 percent to the right wrist and 7 percent to the left wrist all to the body as a whole. Dr. Zimmerman then combined these under the AMA Guides for a 22 percent whole body rating. In reviewing the conversion chart in the AMA Guides, the Appeals Board notes that the above whole body impairments would combine to a 20 percent whole body rating and not 22 percent as indicated by Dr. Zimmerman.

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends. This burden must be carried by a preponderance of the credible evidence. See K.S.A. 44-501; K.S.A. 44-508(g), See also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

K.S.A. 1992 Supp. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

Claimant was referred to two vocational experts regarding claimant's loss of access to the open labor market and loss of ability to earn a comparable wage. Claimant's expert, Mr. Jerry Hardin, found claimant to have suffered a 70 to 75 percent loss of access to the open labor market, when claimant's preexisting restrictions were taken into consideration, and a 75 to 80 percent loss if no pre-injury restrictions were taken into account. Karen Terrill, respondent's expert, found claimant to have suffered a 38 percent loss of access to the open labor market taking into consideration the previous restrictions on claimant's neck.

The Assistant Director rejected the testimony of Ms. Terrill, finding Ms. Terrill had taken into account the preexisting restrictions which had been removed by Dr. Clark prior to claimant's return to work with respondent in November 1992. Ms. Terrill's testimony indicates she did not take into consideration the upper extremity restrictions which had been removed by Dr. Clark, but did consider the restrictions to claimant's neck, which appeared to remain. The Appeals Board finds the opinion of Ms. Terrill to be more accurate and adopts Ms. Terrill's opinion that claimant has lost 38 percent of his access to the open labor market as a result of the injuries suffered with the respondent from November 6, 1992 to January 5, 1993. The Appeals Board considered the opinion of Mr. Hardin but had difficulty comprehending how such a minor change could result regarding claimant's loss of access to the open labor market when preexisting restrictions were first considered and then rejected. In adopting the opinion of Ms. Terrill regarding claimant's loss of access to the open labor market, the Appeals Board has taken into consideration the retraining provided to claimant through vocational rehabilitation.

The Appeals Board also considered the claimant's loss of ability to earn a comparable wage. Ms. Terrill found claimant capable of earning \$400 to \$480 per week in post-employment jobs. Mr. Hardin testified claimant was capable of earning \$280 per week, which corresponds to a starting salary in Wichita of \$7 per hour. Mr. Hardin was

asked to compare claimant's earning ability to his actual agreed upon date of injury average weekly wage of \$889.51 and found claimant to have suffered a 69 percent loss of wage earning capacity. Ms. Terrill, on the other hand, was not asked to compare her estimate of claimant's wage earning abilities to claimant's actual average weekly wage. The Appeals Board believes the opinion of Ms. Terrill, regarding claimant's earning abilities, to be somewhat inflated, in light of the facts of this case. The Appeals Board finds the opinion of Mr. Hardin, in comparing claimant's earning ability of \$280 per week to the claimant's actual average weekly wage, resulting in a 69 percent loss of ability to earn comparable wage, as appropriate, and adopts same as its opinion.

In determining the extent of permanent partial disability, both the reduction of claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered. The statute is silent as to what emphasis is to be placed on each factor. The Kansas Supreme Court in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), found that, while it is not required, applying equal emphasis to each factor is an appropriate method of computation. The Appeals Board finds no legitimate reason for placing greater emphasis upon one factor over the other. As such the Appeals Board finds, when comparing claimant's loss of access to the open labor market of 38 percent with claimant's loss of ability to earn a comparable wage of 69 percent, that claimant has suffered a 53.5 percent permanent partial general body work disability as a result of the injuries suffered with respondent during the period November 6, 1992 to January 5, 1993.

Additional issues decided by the Assistant Director, but not appealed to the Appeals Board, are affirmed insofar as they are not inconsistent with the opinions expressed herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director Brad E. Avery should be, and is hereby, modified and the claimant, Roosevelt DeShazer, is granted an award against the respondent, The Boeing Company-Wichita, and its insurance carrier, Aetna Casualty & Surety Company, for an accidental injury occurring November 6, 1992 through January 5, 1993, with benefits commencing January 5, 1993.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Roosevelt DeShazer, and against the respondent, The Boeing Co.- Wichita, and its insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund. Claimant is entitled to 82.57 weeks temporary total disability compensation at the rate of \$299.00 per week in the amount of \$24,688.43, followed by compensation at the rate of \$299.00 per week until the total award reaches \$100,000.00 for a 53.5 percent general body work disability.

As of March 22, 1996, claimant is entitled to 82.57 weeks temporary total disability compensation at the rate of \$299.00 per week in the sum of \$24,688.43, followed thereafter by 84.86 weeks permanent partial general body disability at the rate of \$299.00 per week in the amount of \$25,373.14, for a total due and owing of \$50,061.57, which is ordered paid in one lump sum minus any amounts previously paid.

Thereafter, the remaining balance in the amount of \$49,938.43 shall be paid at the rate of \$299.00 per week until fully paid or further order of the Director.

Pursuant to K.S.A. 1992 Supp. 44-536 claimant's contract of employment with counsel is hereby approved.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent, its insurance carrier and the Kansas Workers Compensation Fund to be paid as follows:

Barber & Associates	
Transcript of Regular Hearing	\$271.55
Don K. Smith & Associates	
Deposition of Karen C. Terrill	\$145.00
Deposition of Harry Morris, M.D.	\$169.00
Gene Dolginoff Associates, Ltd.	
Deposition of Daniel Zimmerman	\$293.45
Deposition of Daniel Zimmerman	\$209.20
Satterfield Reporting Services	
Deposition of Jerry Hardin	\$279.20

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Brian Pistotnik, Wichita, KS
 Eric K. Kuhn, Wichita, KS
 Edward D. Heath, Jr., Wichita, KS
 Brad E. Avery, Assistant Director
 Philip S. Harness, Director